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In the Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD A. LAUCHLI, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In this federal excise tax case, petitioner seeks review of the decision below holding that he was liable for federal excise taxes on the making and transferring of certain firearms, and that his interest in a parcel of real estate should be foreclosed to satisfy this tax liability.

The pertinent facts are undisputed and may be summarized as follows: In 1964, petitioner transferred one fully automatic Bren machine gun, and seven Browning and one hundred two Thompson

machine guns to an undercover agent of the Bureau of Alcohol, Tobacco and Firearms of the Treasury Department. In connection with these transfers, petitioner failed to pay the excise tax required by 26 U.S.C. 5811(a). In 1965, petitioner was convicted for transferring these machine guns without paying the transfer tax. This conviction was affirmed. *United States* v. *Lauchli*, 371 F.2d 303 (7th Cir. 1966) (Pet. App. A2, A6).

Prior to transferring the Bren and Thompson machine guns, petitioner had made them serviceable. However, he failed to pay the excise tax imposed by 26 U.S.C. 5821(a) on the "making" of a firearm (Pet. App. A2; R. 3a),[1] which includes the acts of putting together or altering a firearm. See 26 U.S.C. 5845(i).

On May 19, 1967, the Internal Revenue Service assessed these unpaid federal excise taxes against petitioner in the amount of $51,922.46 (Pet. App. A3). On this date, the Service sent a notice of assessment and a demand for payment. On July 6, 1967, the Service filed a notice of federal tax lien for these unpaid excise taxes with the Recorder of Deeds of Madison County, Illinois, where petitioner owned an undivided one-half interest in certain real property (R. 2a-4a).

On July 26, 1968, the government filed its complaint in the district court to reduce this assessment to judgment.[2] On October 9, 1969, the government

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[1] "R." refers to the record appendix attached to the government's brief in the court of appeals.

[2] The complaint was filed in the United States District Court for the Southern District of Indiana because petitioner was then incarcerated there. This action was thereafter transferred to the United States District Court for the Southern District of Illinois (R. 1a).

filed a complaint against petitioner and his wife to foreclose the federal tax lien against petitioner's real property, to sell it, and to apply the proceeds of the sale against petitioner's outstanding tax liabilities (Pet. App. A3; R. 1a-2a).

After a consolidated trial, the district court found: (1) that the machine guns transferred by petitioner in 1964 were "firearms" within the meaning of 26 U.S.C. 5845(a) and were subject to the transfer tax of Section 5811(a); (2) that the Bren and Thompson machine guns were made by petitioner within the meaning of Section 5821(a) and were therefore subject to the $200 per firearm making tax imposed by that provision; and (3) that the United States had a valid tax lien against all property or rights to property belonging to petitioner, including his undivided one-half interest in the real property located in Collinsville, Illinois (Pet. App. A3; R. 1a-5a). Accordingly, the district court entered judgment in favor of the government in the amount of $76,409.10, plus interest, and a foreclosure decree (Pet. App. A3-A4; R. 8a-11a). The court of appeals affirmed (Pet. App. A1-A12).[3]

1. The decision below correctly upheld petitioner's liability for excise tax on the transfer of firearms. Petitioner argues (Pet. 12-14) that the transfer tax may not be imposed because the National Firearms Act, ch. 757, 48 Stat. 1236 (26 U.S.C. 5801-5872) violates the Self-Incrimination Clause of the Fifth Amendment.[4] When this issue was first raised by

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[3] The court of appeals remanded the case to correct a clerical error in the amount of the judgment (Pet. App. A7-A8, A12).

[4] Petitioner errs in asserting (Pet. 11) that the district court did not have original jurisdiction in this case. See

petitioner in a motion under 28 U.S.C. 2255 to vacate his sentence for failure to pay the tax, the court of appeals remanded that case to the district court to hold an evidentiary hearing to determine whether manufacturers and transferors of "firearms" were a suspect class under *Haynes* v. *United States*, 390 U.S. 85 (1968). See *Lauchli* v. *United States*, 432 F.2d 1207 (7th Cir. 1970).[5] The district court determined that manufacturers and transferors of firearms were not a suspect class, and the court of appeals affirmed. *Lauchli* v. *United States*, 481 F.2d 408 (7th Cir. 1973). Contrary to petitioner's contentions (Pet. 14), the court below correctly determined that petitioner was now collaterally estopped from relitigating that issue in this proceeding (Pet. App. A6-A7). See *Montana* v. *United States*, 440 U.S. 147, 153-154 (1979).

Petitioner also argues that the National Firearms Act creates a suspect class under the Fifth Amendment with respect to the $200 per firearm making tax imposed by Section 5821.[6] But if manufacturers

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28 U.S.C. 1340, 1345; 26 U.S.C. 7402 of the Internal Revenue Code of 1954.

[5] In *Haynes*, this Court held that former Section 5841, which required anyone in possession of a firearm, legally or illegally, to register the firearm, violated the self-incrimination clause of the Fifth Amendment because the registration of the firearm posed an immediate threat of criminal prosecution under former Sections 5851 and 5861 (see 390 U.S. at 95-96). None of these provisions, which were modified or repealed by the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, is involved in this case.

[6] The firearm-making tax was not involved in taxpayer's 1965 criminal conviction. Hence, petitioner is not estopped by any prior proceedings from arguing that the National Firearms Act creates a suspect class with respect to the firearm-making tax.

of firearms are not an inherently suspect criminal class, as the court below previously held, then those who make firearms, without being engaged in a business, are likewise not a suspect class. See generally, *Snook* v. *United States*, 451 F.2d 329 (5th Cir. 1971).

Accordingly, petitioner is liable for the civil tax assessments at issue here under 26 U.S.C. 5811(a) and 5821(a). See *Haynes* v. *United States*, *supra*, 390 U.S. at 90, 98; *Grosso* v. *United States*, 390 U.S. 62, 69 n.7 (1968).[7]

2. Petitioner further argues (Pet. 14-18) that the length of time consumed in the proceedings, from the date the initial complaint was filed to the date the findings of fact and conclusions of law were issued (a period of almost eight years), denied him due process because of the resulting prejudice to his case. But due process does not require that the defendant in civil cases be given a speedy trial. See *Ad Hoc Committee on Judicial Administration* v. *Commonwealth of Massachusetts*, 488 F.2d 1241, 1244 (1st Cir. 1973). Even on the assumption that delay in civil proceedings may violate due process, the aggrieved party

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[7] There is no merit to petitioner's argument (Pet. 12) that the decision here conflicts with *Lauchli* v. *United States*, 402 F.2d 455, 456 (8th Cir. 1968), which involved a completely separate firearms transfer from that presented here. There, the court reversed petitioner's *criminal* conviction for transferring firearms without paying any transfer tax in light of *Marchetti* v. *United States*, 390 U.S. 39 (1968); *Grosso* v. *United States*, *supra*; and *Haynes* v. *United States*, *supra*. *United States* v. *U.S. Coin and Currency*, 401 U.S. 715 (1971) (Pet. 12-13), involving a forfeiture statute, is likewise irrelevant, as is this Court's order (402 U.S. 938 (1971)) vacating and remanding petitioner's case involving the forfeiture of the firearms in light of these decisions. See *United States* v. *U.S. Coin and Currency*, *supra*, 401 U.S. at 718.

bears the burden of showing that prejudice resulted from the delay. Cf. *Smith* v. *United States*, 577 F.2d 1025, 1027 (5th Cir. 1978); *United States ex rel. Sims* v. *Sielaff*, 563 F.2d 821, 828 (7th Cir. 1977). Petitioner has made no such showing. To the contrary, during this delay petitioner benefited from any increase in the value of his real property subject to the tax lien foreclosed in this case, and has prolonged the period during which he possessed this real property.

Although petitioner further alleges (Pet. 14-16) that during the delay witnesses were lost and memories dulled, he never indicated to the district court that he wanted to call any person to testify other than himself (Sept. 11, 1972 Tr. 15). There has been no showing of any dilatory acts on the part of the government in these proceedings. Rather, the proceedings were delayed principally by the numerous motions filed by petitioner (Pet. App. A9; Sept. 11, 1972 Tr. 3), and the settlement negotiations he initiated (May 8, 1973 Tr. 4). Finally, the fact that the district court had the case under advisement for three years is not attributable to the government.

Petitioner also suggests (Pet. 8-9, 16-17) that the court below erred in finding no prejudice because of the district judge's health. Even though the district judge was ill at the time he issued the findings of fact and conclusions of law, the court below correctly held that no evidence in the record indicated that his condition interfered with his mental capacity (Pet. App. A9-A10). Indeed, the findings of the district court, partially in favor of petitioner and partially in favor of the government, indicate that the district judge fully exercised his judicial functions (Pet. App. A10).

3. Finally, petitioner contends (Pet. 10-11, 18-20) that the government's case should be dismissed be-

cause the government agent who purchased the firearms in question used a false name and, in petitioner's view, violated 18 U.S.C. 1001 (Pet. App. A11 n.2). Section 1001 provides for criminal penalties for the commission of any fraudulent acts against the federal government. The purpose of Section 1001 is not to prohibit the use of false identities by undercover agents, but to protect the government from harmful fraud and false information. See *United States* v. *Bramblett*, 348 U.S. 503 (1955).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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